IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOSE ALBERT CASTRO,	:	CIVIL ACTION No. 4:15-CV-1833
Petitioner	:	(Judge Brann)
v.	:	
	:	(Magistrate Judge Carlson)
ROBERT GILMORE,	:	
Respondent	:	(Electronically filed)

RESPONSE TO PETITION FOR HABEAS CORPUS

The Commonwealth of Pennsylvania, by its undersigned counsel, hereby files its response to the Petition for Habeas Corpus pursuant to 28 U.S.C. §2254 in the above captioned matter and states as follows:

1. The Commonwealth will refer to the petitioner, Jose Albert Castro, herein as "Defendant" for purposes of clarity, as the underlying State Court documents refer to the petitioner as "Defendant."

2. On September 21, 2015, Defendant filed a Petition for Writ of Habeas Corpus with the Clerk of the U.S. District Court of the Middle District of Pennsylvania.

3. This Petition stems from a conviction in Pennsylvania Criminal Case number CP-67-CR-0000463-2010, where, following a jury trial, Defendant was found guilty and convicted of the offense of Murder of the First Degree. *See* Reproduced Record (hereinafter "R.R."), p. 34.

4. On November 30, 2010, Defendant was sentenced to life imprisonment. R.R. at 44.

5. Defendant timely filed a Post-Sentence Motion on December 9, 2010. R.R. at 49. Defendant then filed an Amended Post-Sentence Motion on February 18, 2011, and Follow-Up Post-Sentence Motions on March 23, 2011. R.R. at 55, 63.

6. On May 6, 2011 the Trial Court issued a Memorandum Order denying Defendant's Post-Sentence Motions on May 6, 2011. R.R. at 92.

7. Defendant timely filed a direct appeal to the Pennsylvania Superior Court on May 9, 2011, docketed at 863 MDA 2011. R.R. at 97.

8. Defendant's conviction was affirmed by the Pennsylvania Superior Court on January 27, 2012. R.R. at 192.

9. Defendant timely filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court on February 27, 2012, docketed at 144 MAL 2012. R.R. at 205.

10. Defendant's Petition was denied by the Pennsylvania Supreme Court on August 1, 2012. R.R. at 238.

11. Defendant filed a Petition for Writ of Certiorari to the United States Supreme Court on October 30, 2012, at number 12-6984. R.R. at 243.

12. The Supreme Court denied Defendant's Petition on January 7, 2013. R.R. at 243.

13. Defendant timely filed a Post-Conviction Relief Act ("PCRA") Petition with the Court of Common Pleas of York County, Pennsylvania on January 28, 2013. R.R. at 245. Defendant filed an amended PCRA Petition on February 27, 2013. R.R. at 276.

14. The Common Pleas Court denied both of Defendant's PCRA Petitions on August 28, 2013. R.R. at 343.

15. Defendant timely filed an appeal of his PCRA Denial to the Pennsylvania Superior Court on September 19, 2013, docketed at 1682 MDA 2013. R.R. at 361.

16. The Superior Court affirmed the denial of Defendant's PCRA Petitions on February 9, 2015. R.R. at 413.

17. Defendant did not seek permission to appeal from the Pennsylvania Superior Court.

18. Defendant filed his Petition for Writ of Habeas Corpus on September 21, 2015, docketed at 4:15-CV-1833. By the Commonwealth's calculations, Defendant's Habeas Petition is timely under 28 U.S.C. §2244(d)(1).

19. On September 30, 2015 this Honorable Court ordered the Commonwealth to file an answer to Defendant's Petition, said answer due on or before October 30, 2015.

20. On October 28, 2015 the Commonwealth requested an extension of time for which the Commonwealth may respond to Defendant's Habeas Petition. Said request was granted.

21. The Commonwealth now responds to Defendant's Petition.

RESPONSE TO PETITION FOR HABEAS CORPUS

Before a state prisoner may obtain Federal Habeas Corpus review of his conviction, he must exhaust his remedies in state court. 28 U.S.C. §2254(b)(1)(A); Anderson v. Harless, 459 U.S. 4 (1982); Burkett v. Cunningham, 826 F.2d 1208, 1213 (3d Cir. Pa. 1987). A writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in State Court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. §2254(d); *see also* Jamison v. Klem, 544 F.3d 266 (3d Cir. Pa. 2008). Further, 28 U.S.C. §2254(e)(1) states that:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
> (A) the claim relies on --
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. §2254(e)(1).

In regards to waived claims never raised before the Pennsylvania Courts, "Federal habeas court cannot review the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice, or that a fundamental miscarriage of justice will result if the court does not review the claims." Showers v. Beard, 586 F.Supp.2d 310 (M.D. Pa. 2008); *see also* McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. Pa. 1999); Caswell v. Ryan, 953 F.2d 853, 857, 861-62 (3d Cir. Pa. 1992). "Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

STATEMENT OF THE CASE

The Commonwealth hereby adopts the statement of the facts of the instant case as set forth in the Commonwealth's Brief as Appellee from November 15, 2011, docketed at 863 MDA 2011:

> [Defendant], Jose Alberto Castro, known to the people who dealt with him as "Chucky", was a drug dealer who sold heroin and cocaine out of his house near 451 South Queen Street in York, next to the Spanish grocery store. The victim, Pedro Solis-Baez, known to his friends as "Kiki", and two of his friends, Braulio Ortiz and Ismeal Sanchez (a/k/a "Coco"), frequently purchased drugs from [Defendant].
>
> Several weeks prior to his murder, in July of 2009, Kiki bought a bundle of heroin from [Defendant] on credit. Kiki owed [Defendant] eighty ($80) dollars for the drugs but never paid that debt.
>
> Approximately two weeks before Kiki's murder, Mr. Ortiz called [Defendant] because Ortiz had a couple of buyers for [Defendant's] drugs. When [Defendant] arrived at the school parking lot to conduct the transaction, he was angry about Kiki's failure to pay the money he owed [Defendant] for the drugs he had previously purchased. [Defendant] told Ortiz that he "wanted to do him [referring to Kiki] now" and "he [Defendant] would like to get him [Kiki] right now". Ortiz and Coco told [Defendant] not to do it, that it wasn't worth it, and eventually calmed [Defendant] down.
>
> Three days before Kiki's murder, [Defendant] told Coco that Kiki still owed [Defendant] the previously mentioned eighty ($80) dollars and that [Defendant] was going to kill Kiki if Kiki didn't pay him the money.
>
> During the later part of the morning [of] July 31, 2009, Kiki, Ortiz and Coco were sitting together on the porch of Ortiz' mother's residence at 317 South Queen Street. [Defendant] rode up on a bicycle and spoke to Ortiz. [Defendant] was wearing a blue NBA Dallas Maverick throwback t-shirt with blue shorts and a blue hat. [Defendant's] hair was long and he wore it in a ponytail. [Defendant]

asked Ortiz if Ortiz would find him a bag of weed. Ortiz informed [Defendant] that the guy with the weed wasn't home. [Defendant] stayed there for a few moments then left. At that point, it was approximately 11:30 a.m.

A short time later, Kiki, Ortiz and Coco went to the back-yard area of Ortiz's mother's residence. Kiki borrowed Ortiz's cell phone to make a call to have somebody come to the residence to pick him up. The trio then split up. Ortiz began rolling a blunt with an individual named Mariano and Coco's brother, though he continued to observe Kiki's and Coco's activities. A guy Coco did drugs with called out to Coco, and Coco went across the ally and began speaking to him.

Meanwhile, Kiki was standing alone in the alley. [Defendant] walked up to Kiki, with a gun in his hand, stood in front of Kiki and then shot Kiki in the chest. Kiki turned away from [Defendant] and tried to run. However, [Defendant] shot Kiki four more times in the back. Kiki dropped to the ground.

Immediately after shooting Kiki, [Defendant] moved his hat to try and hide his face and long hair. [Defendant] then walked back to his Green Explorer van like nothing had happened and drove off. After [Defendant] left the scene, Ortiz went outside to check on Kiki. Kiki was dead. Ortiz then took the phone that Kiki had previously borrowed from him out of Kiki's pocket.

The parties stipulated that Pedro Solis-Baez died on July 31, 2009, at 12:36 p.m. The parties also stipulated that Pedro Solis-Baez's death was caused by multiple gunshot wounds and that the manner of his death was homicide.

York City Police Officers Daniels, Ross and Hansel were dispatched to the scene at 12:30 p.m. by County Control due to a report of a shooting. Officer Hansel was the first to arrive at the scene. He approached Kiki's body to see whether Kiki was beyond medical help. He signaled to the other officers that Kiki was beyond medical help and they immediately began securing the perimeter of the crime scene.

Dr. Samuel Land, a board certified forensic pathologist with the Lehigh Valley Health Network, performed the autopsy on Kiki's body on August 2, 2009. Doctor Land indicated that "Kiki" had been shot five times and died of multiple gunshot wounds. One of Kiki's gunshot wounds entered Kiki's body through the chest, a wound that would have caused death within minutes, and the remaining four gunshot wounds entered Kiki's body through the back and buttocks area. Several of the wounds to Kiki's back would have immediately prevented him from ambulating and would have also been fatal.

At the scene, Officer Daniels received word from a bystander that Mr. Sanchez [Coco] had been seen earlier speaking with the victim. Officer Daniels approached Coco and asked if he knew who the victim was. Coco told her the victim's name was Kiki. Coco was then transported to the police station to be interviewed. During that interview, Coco selected the Defendant's picture from a photo-array and informed the Officers that [Defendant] was the individual who shot Kiki.

A few days after killing Kiki, [Defendant] called Ortiz on the telephone. [Defendant] told Ortiz that he had received word that Coco was talking and told Ortiz to tell Coco to keep his mouth shut.

On August 5, 2009, the police interviewed Ortiz at the police station. During the interview, Ortiz selected [Defendant's] picture from a photo-array and informed officers that [Defendant] was the individual who shot Kiki.

As a result of the information gleaned from the police investigation, Detective Baez, York City Police Department, filed criminal homicide charges against [Defendant]. A warrant was issued for [Defendant's] arrest. [Defendant] was arrested in New York City on August 11, 2009, and later brought to York County.

When [Defendant] was arraigned at the York County Prison, a fellow inmate by the name of Hector Perez was asked to interpret for the Defendant. Following the arraignment, [Defendant] told Perez that he [Defendant] was being accused of homicide and that here were two witnesses testifying against him. Later that day, [Defendant] requested Perez to translate for him so that he could fill out a form

> seeking a Public Defender. During that process, [Defendant] told Perez that on the day of the homicide, he had seen Kiki and that Kiki made a gesture like Kiki was going to pull out a gun on him. [Defendant] told Perez that he was in a van with another guy and told the guy to circle around the block. After they had done so, [Defendant] claimed that he stepped out of the van, snuck up on Kiki and shot him. [Defendant] explained that the reason he shot Kiki was because of drug money Kiki owed him. [Defendant] also told Perez that he gave the gun he used to kill Kiki to another individual and told that person to get rid of the gun for him. Finally, [Defendant] stated that after the murder, he fled to Philadelphia, and then to New York.

R.R. at 151- 55 (internal citations omitted).

RESTATEMENT OF DEFENDANT'S CLAIMS

Having reviewed Defendant's Brief, the Commonwealth believes that the Defendant raises the following claims in his instant Petition for Habeas Corpus, of which some claims are intertwined, to which the Commonwealth shall respond:

I. Defendant claims his Constitutional rights were violated because he only had one interpreter at trial.

II. Defendant claims trial counsel was ineffective for entering into a stipulation with the Commonwealth regarding the testimony of Barry Bloss, the Coroner and therefore, his Constitutional rights were violated.

III. Defendant claims that his Post-Conviction Relief Act (hereinafter "PCRA") counsel was ineffective for the following reasons: (A) failing to argue ineffectiveness regarding stipulation to the testimony of Barry Bloss, the Coroner; (B) for failing to adequately review the case file in its entirety; (C) for filing a no-merit letter; and (D) for failing to argue for production of a video tape.

IV. Defendant claims the Commonwealth engaged in bad faith prosecution and withheld evidence from the Defendant, specifically, a video.

RESPONSE TO DEFENDANT'S ISSUES ON THE MERITS

Defendant claims that (I.) his Constitutional rights were violated because he only had one interpreter at trial; and (II.) that trial counsel was ineffective for entering into a stipulation with the Commonwealth regarding the testimony of Barry Bloss, the Coroner and, therefore, his Constitutional rights were violated.

The Commonwealth submits that Defendant is procedurally defaulted from raising his first two claims: (I) violation of his Constitutional rights because he only had one interpreter at trial; and (II) violation of his Constitutional rights because defense counsel stipulated to testimony of the Coroner, Barry Bloss. The Commonwealth objects to Defendant raising these claims. Defendant raises said claims for the first time in the Petition for Writ of Habeas Corpus. Defendant failed to exhaust the remedies available in the courts of the State as required by 28 U.S.C. §2254(b)(1)(A), and Defendant is procedurally defaulted from raising said claims in a Petition for Writ of Habeas Corpus. Thus Defendant waived his first two claims and is not eligible for relief.

It is a well-established principle that a state prisoner must exhaust all of his claims by "giv[ing] the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); *see also* 28 U.S.C. §2254(b)(1)(A). Under the exhaustion requirement of the provisions of the federal habeas corpus statute at 28 U.S.C. §2254(b), a state prisoner is required to exhaust available state court remedies before seeking federal habeas corpus relief. *See* 28 U.S.C. §2254(b)(1)(A).

The petitioner must show that the claim raised in his Petition was fairly presented to each level of the state courts. Duncan v. Henry, 513 U.S. 364 (1995); *quoting* Picard v. Connor, 404 U.S. 270, 275 (1971). This requires the petitioner to demonstrate that "the claim brought in federal court [is] the substantial equivalent of that presented to the state courts." Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. Pa. 1989) (citations omitted), *cert. denied*, 493 U.S. 1036 (1990). In other words, the petitioner must present a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F. 3d 255, 261 (3d Cir. Pa. 1999).

Pursuant to Pennsylvania Supreme Court Order 218, effective May 9, 2000, issues presented to the Pennsylvania Superior Court are considered exhausted for the purpose of federal habeas corpus relief under section 2254. *See In re Exhaustion of States Remedies in Criminal and Post-Conviction Relief Cases*, No. 218, Judicial Administration Docket No. 1 (May 5, 2000) (*per curiam*). All Habeas Corpus claims must be raised in state court in accordance with state procedural rules. Edwards v. Carpenter, 529 U.S. 446, 453 (2000); *see also* 28 U.S.C. §2254(b)(1)(A). In Pennsylvania, a Habeas Corpus petitioner exhausts a claim by raising it either on direct appeal or in a petition under the PCRA. Halloway v. Horn, 355 F.3d 707, 717 (3d Cir. Pa. 2004).

A claim is unexhausted if it has not been brought before one or more levels of state courts *and* Defendant "has the right under the law of the State to raise, by any available procedure, the question presented." *See* 28 U.S.C. §2254(b), (c) (*emphasis added*). With limited exception, federal courts will not address the merits of any claim raised by a Petitioner that was not properly exhausted in state court. Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. Pa. 2000). "The exhaustion requirement ensures that state courts have the first opportunity to review convictions and preserves the role of state courts in protecting federally guaranteed rights." Id. Petitioner carries the burden of establishing that his claims have been exhausted in the state courts. Id.

If a Petitioner presents unexhausted Habeas claims to a Federal Court, but state procedural rules bar further state court review and thus the petitioner is clearly foreclosed from bringing an unexhausted claim in state court, including if it is time-barred, the claim is procedurally defaulted. Wenger v. Frank, 266 F.3d 218, 223 (3d Cir. Pa. 2001); O'Sullivan, 526 U.S. at 848. Although such claims are deemed exhausted, they are considered procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 749 (1991); Lines, 208 F.3d at 159. The merits of a procedurally defaulted claim cannot be considered on habeas review unless the petitioner establishes "cause" for the procedural default and "actual prejudice" as a result of the alleged violation of federal law, or that failure to consider the claims will result in a "fundamental miscarriage of justice" that excuses the default. Coleman, 501 U.S. at 750; McCandless, 172 F.3d at 260.

To demonstrate "cause" the petitioner must show that something "external" to the defense impeded the petitioner's efforts to comply with the state's procedural rule. Danner v. Cameron, 955 F. Supp. 2d 410, 419 (M.D. Pa. 2013); *citing* Murray v. Carrier, 477 U.S. 478, 488 (1986). Once the Petitioner successfully demonstrates "cause," he must then prove "prejudice," which must be something that "worked to petitioner's actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Danner, 955 F. Supp. 2d at 419; *citing* Murray, 477 U.S. at 494.

Alternatively, a federal court may excuse a procedural default when the petitioner establishes that failure to review the claim will result in a "fundamental miscarriage of justice." Danner, 955 F. Supp. 2d at 419; *citing* Werts v. Vaughn, 228 F.3d 178, 192-93 (3d Cir. Pa. 2000). This exception is confined to cases of actual innocence, as compared to legal innocence, where the petitioner can show that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of new evidence. Danner, 955 F. Supp. 2d at 419; *citing* Schlup v. Delo, 513 U.S. 298 (1995). To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. Danner, 955 F. Supp. 2d at 419; *citing* Schlup, 513 U.S. at 324.

The Commonwealth submits that Defendant's claims are barred under state law proceedings. Defendant failed to exhaust the remedies available in the courts of the Commonwealth of Pennsylvania. Defendant did not raise either of these claims at any point during appellate review of Defendant's case as required by 28 U.S.C. §2254(b)(1)(A).

First, Defendant appealed the judgment of sentence of November 30, 2010 to the Pennsylvania Superior Court, docketed at 863 MDA 2011. R.R. at 201. Defendant raised four (4) issues on appeal as reflected in his 1925(b) Statement, including weight of the evidence, admission of evidence, the trial court's jury instructions, and the legality of his sentence; however, Defendant failed to address the instant claims regarding interpretation services or stipulation to the Coroner's testimony. Id. at 100. Nor were the issues of interpreters or interpretation services, or stipulated testimony addressed at any point in the Superior Court Order affirming the Judgment of Sentence. Id. at 192.

Next, Defendant filed a PCRA Petition on January 24, 2013 and an amended Petition on February 27, 2013. Id. at 245, 276. In Defendant's PCRA Petitions, Defendant raised several claims of ineffective assistance of counsel; however, Defendant failed to raise the instant issues at any point on PCRA review. Id. The

Trial Court denied Defendant's PCRA Petitions on August 28, 2013. Id. at 343. Defendant timely appealed the Order to the Pennsylvania Supreme Court, docketed at 1682 MDA 2013. Id. at 240. Defendant raised five (5) issues on appeal as reflected in his 1925(b) Statement, none of which included the instant claims. Id. at 364. Nor did the Superior Court Order affirming denial of Defendant's PCRA Petition address the issue of interpreter services or stipulated testimony. Id. at 413. Defendant petitioned the Pennsylvania Supreme Court for review of his PCRA appeal, however, allowance was denied. Defendant then petitioned the United States Supreme Court for review, however, the Supreme Court denied review of Defendant's appeal.

The Commonwealth submits that Defendant's instant claims are barred under state law proceedings. To be eligible for relief under the Post-Conviction Relief Act, a petitioner must show that his claims have not been previously litigated or *waived*. 42 Pa.C.S. §9543(a)(3) (*emphasis added*). An issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state post-conviction proceeding. 42 Pa.C.S. §9544(b). Defendant failed to raise the issue of interpreter services or ineffectiveness for entering into a stipulation on appeal or in his previously PCRA Petitioner. Accordingly, these issues are waived.

Moreover, Defendant is unable to raise the instant issues as those claims would be untimely and thus, procedurally barred. Defendant is time-barred from further filing a PCRA Petition pursuant to 42 Pa.C.S. §9545(b), which states that any PCRA petition must be filed within one year of the date the judgment becomes final, unless the petitioner can plead and prove one of the following:

> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

42 Pa.C.S §9545(b)(1). Additionally, any petition invoking an exception shall be filed within sixty (60) days of the date the claim could have been presented. 42 Pa.C.S. §9545(b)(2). To invoke an exception, the petitioner must plead it explicitly and satisfy the burden of proof. Commonwealth v. Beasley, 741 A.2d 1258, 1261-62 (Pa. 1999).

A judgment becomes final for purposes of PCRA "at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review." 42 Pa.C.S. 9545(b)(3). "A plain reading of the PCRA's timeliness requirements indicates that they are intended to apply to all PCRA petitions, regardless of the nature of the individual claims raised therein. Commonwealth v. Murray, 753 A.2d 201, 203 (Pa. 2000); *see* 42 Pa.C.S. §9545(b); *see also* Commonwealth v. Owens, 718 A.2d 330 (Pa. Super. 1998) (noting that, under the plain language of 42 Pa.C.S. §9545, the substance f a PCRA petition is irrelevant to its timeliness).

The PCRA's timeliness requirements are mandatory and jurisdictional in nature; no court may properly disregard or alter them in order to reach the merits of the claims raised in a PCRA petition that is untimely filed. *See* Commonwealth v. Murray, 753 A.2d at 203. Thus, Defendant's sentence became final as it relates to PCRA timeliness on January 7, 2013, when the United States Supreme Court denied review of Defendant's appeal. As such, the deadline for Defendant to file a timely PCRA Petition fell on January 7, 2014, which was 365 days after Defendant's sentence became final. Defendant then timely filed the instant Petition for Habeas Corpus on September 21, 2015.

Defendant's one (1) year filing window has passed and, because Defendant did not plead and prove any of the aforementioned exceptions, the Commonwealth submits that Defendant is barred from raising the issues of interpreter services and ineffectiveness of counsel for entering into a stipulation at trial. Defendant additionally fails to plead or establish any cause and prejudice, or any fundamental miscarriage of justice occurred, that would excuse Defendant from procedural default.

The State courts did not have an opportunity to rule on the instant issues. However, Defendant is procedurally defaulted from bringing the unexhausted claims relating to interpreter services or stipulation to the Coroner's testimony in state court. Defendant could have raised both of these issues previously but failed to do so, at any time, in state court. Thus, state remedies are not available to Defendant's unexhausted claims, and as such, Defendant's claims are procedurally defaulted. As Defendant's claim is procedurally defaulted, habeas relief should be denied. Accordingly, the Commonwealth respectfully requests that this Honorable Court dismiss these two (2) claims with prejudice.

(III.) Defendant claims that his Post-Conviction Relief Act (hereinafter "PCRA") counsel was ineffective for the following reasons: (A) failing to argue ineffectiveness regarding stipulation to the testimony of Barry Bloss, the Coroner; (B) for failing to adequately review the case file in its entirety; (C) for filing a no-merit letter; and (D) for failing to argue for production of a surveillance video tape.

Defendant raises several claims of ineffectiveness of PCRA counsel in his instant Petition. Defendant's claims are interwoven with other claims. After reviewing Defendant's Petition, as far as the Commonwealth can discern, the Defendant is claiming ineffective assistance of PCRA counsel for four reasons as follows: (A) for failing to argue ineffectiveness regarding stipulation at trial to the testimony of Coroner, Barry Bloss; (B) for failing to adequately review the case file in its entirety; (C) for filing a no-merit letter; and (D) for failing to argue for the production of a surveillance video tape.

The Commonwealth objects to Defendant raising claims of ineffectiveness of PCRA counsel on collateral review. Such claims are not cognizable because Defendant cannot claim constitutionally ineffective assistance of PCRA counsel. *See* 28 U.S.C. §2254(i); *see also* Coleman v. Thompson, 501 U.S. 722, 752-53 (1991) (no constitutional rights to effective assistance of counsel in state post-conviction proceedings). The Martinez opinion, however, recognizes a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings (*e.g.*, PCRA) may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

Only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default. Id. at 1318.

When a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective assistance claim in two circumstances: (1) where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance of counsel; or (2) where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of Strickland v. Washington, 466 U.S. 668 (1984). Martinez at 1318. In the instant matter, the State court did appoint counsel for Defendant. As such, after review of Defendant's Petition, the Commonwealth assumes Defendant argues that appointed PCRA counsel was ineffective where a claim should have been raised. *See* Strickland, *supra.*

Only if PCRA counsel was ineffective for failing to raise *substantial* claims of trial counsel ineffectiveness during PCRA proceedings, it would constitute cause to excuse procedural default of those claims, and permit review. Martinez, 132 S.Ct. at 1320. A "substantial" underlying claim is a claim that has "some merit." Id. at 1318-19. To establish these ineffectiveness claims, Defendant must first show counsel's performance was deficient, meaning counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Danner v. Cameron, 955 F. Supp. 2d 410, 425 (M.D. Pa. 2013); *citing* Strickland, 466 U.S. at 687.

Second, Defendant must show "the deficient performance prejudiced the defense," meaning counsel's "errors were so serious as to deprive the defendant of a fair trial." Id. To meet this prong, Defendant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. This is an objective inquiry; "a reasonable probability is a probability sufficient to undermine confidence in the outcome." Danner, 955 F. Supp. 2d. at 425; *citing* Strickland, 466 U.S. at 694; *see also* Breakiron v. Horn, 642 F.3d 126, 145 (3d Cir. Pa. 2011). "Unless a defendant makes both showings, it cannot be said that the conviction or… sentence resulted from a breakdown in the adversary process that renders the result unreliable." Danner, 955 F. Supp. 2d. at 425; *citing* Strickland, 466 U.S. at 687.

Upon review of Defendant's Petition, Defendant failed to demonstrate that any of the four (4) sub-issues raised are "substantial" so as to prove PCRA counsel's ineffectiveness. Defendant first argues that PCRA counsel was ineffective for failing to argue ineffectiveness regarding trial counsel's stipulation to the testimony of Coroner, Barry Bloss. At trial, the Commonwealth and defense counsel stipulated as follows:

> [T]hat the victim, Pedro Solis-Baez, his date of death was July 31st, 2009 at 12:36 p.m. The cause of death was multiple gunshot wounds, manner of death was homicide, and that the Commonwealth does not need to call the coroner, Barry Bloss, to testify to such.

R.R. at 59.

Defendant postulates the theory that the victim could have already been deceased when he was shot. *See* Defendant's Habeas Petition, p. 6. Thus, Defendant argues that counsel was ineffective for stipulating to the Coroner's testimony because he then could not cross-examine the Coroner on said theory. Id. Moreover, "[s]uch stipulations are commonplace." *See* United States v. Young, 2012 U.S. Dist. LEXIS 7010, *20 (E.D. Pa. 2012).

Defendant fails to allege any facts in support of his argument. Aside from his bare and unsupported allegation of ineffectiveness, Defendant furthermore does not demonstrate that trial counsel was ineffective for stipulating to the Coroner's testimony. The court cannot grant relief based on vague and conclusory allegations. Danner, 955 F. Supp. 2d at 426; *citing* Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d. Cir. Pa. 1991). As Defendant fails to establish that the underlying claim has any merit, the Commonwealth submits that Defendant's claim fails and cannot be heard on Habeas review.

Defendant next argues that PCRA counsel was deficient for "failing to adequately review the case file in its entirety" because "there exist [sic] no other logical explanation for counsel not to argue that prior to the start of Petitioner's jury trial." *See* Defendant's Habeas Petition, p. 7. Defendant's claim is nonsensical and the Commonwealth is hard pressed to craft a meaningful response to said allegation. Defendant fails to advance any argument or allege any facts to support a conclusion that PCRA counsel did not review his case file in its entirety.

Additionally, as reflected in PCRA counsel's No Merit Letter, counsel performed a conscientious examination of the entire record. R.R. at 310-25. Moreover, PCRA counsel provided the court with an in-depth analysis of Defendant's case, claims, and entire record. Id. This is in stark contrast to Defendant's claim. Defendant's argument lacks any merit and as such, Defendant's claim fails and cannot be heard on Habeas review.

Third, Defendant argues that PCRA counsel was ineffective for filing a no-merit letter. The Turner/Finley decisions provide the manner and mechanism for PCRA counsel to withdraw from representation. *See generally* Commonwealth v. Turner, 544 A.2d 927 (Pa. 1988) and Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988). The holdings of these cases mandate an independent review of the record by competent counsel before a PCRA court or appellate court can authorize an attorney's withdrawal. Commonwealth v. Rykard, 55 A.3d 1177, 1184 (Pa. Super. 2012).

The necessary independent review requires counsel to file a "no-merit" letter detailing the nature and extent of his review and list each issue the petitioner wishes to have examined, explaining why those issues are meritless. Id. In the instant case, PCRA counsel filed a no-merit letter. PCRA counsel undertook an exhausting review of Defendant's case and provided an in-depth analysis of each issue that Defendant wished to have examined, further explaining why the issues were meritless. R.R. at 310-25.

Then, the PCRA court, or an appellate court if the no-merit letter is filed before it, then must conduct its own independent evaluation of the record and agree with counsel that the petition is without merit. *See* Turner, *supra.*; *see also* Commonwealth v. Pitts, 981 A.2d 875, 876 (Pa. 2009). In the instant case, as required, the trial court completed an independent review of Defendant's case and agreed with PCRA counsel that Defendant's issues are meritless. R.R. at 331. Accordingly, pursuant to Pa.R.Crim.P. 907, the Trial Court gave notice of intent to dismiss Defendant's PCRA petition. Id. at 333. Defendant filed his objections on June 18, 2013. Id. at 338.

In response, the Trial Court analyzed Defendant's claims and provided a lengthy opinion in support of denying Defendant's PCRA Petition. Id. at 343-59. The Trial Court held that, "[b]ecause Defendant has failed to establish the ineffectiveness of Trial Counsel, PCRA counsel cannot be deemed ineffective for failing to raise the ineffectiveness claim of Trial Counsel." Id. at 359. Thus, as PCRA counsel complied with the requirements of Turner/Finely, *supra.*, Defendant's argument that counsel was ineffective for filing a no-merit letter simply fails. As such, this claim cannot be heard on Habeas review and should be dismissed.

Last, Defendant argues that PCRA Counsel was ineffective for failing to argue for the production of a surveillance video tape. In support thereof, Defendant avers that PCRA counsel "should have motion/petition the Court for evidentiary development to produce and show exculpatory evidence in the viewing of a video tape that was obtained by the Commonwealth." *See* Defendant's Habeas Petition, p. 7. Defendant contends that argument pertaining to the video was the sole issue on appeal.

Defendant's claim is wholly unsupported by the record. Furthermore, as explained by the Pennsylvania Superior Court, "[the] certified record reflects that two videos taken from the Community Progress Counsel were played for the jury and that the third camera was broken and did not produce any relevant recording." R.R. at 416. The Superior Court held that Defendant's claim is without arguable merit. "As the jury saw the videos, [Defendant's] claim that his trial counsel was ineffective for failing to present the videos to the jury is without arguable merit." Id. at 417. Furthermore, "as the jury saw the videos, [Defendant] is unable to prove the requisite prejudice to prevail on an ineffective assistance of counsel claim. Id.

In Defendant's Petition, Defendant failed to allege any facts in support of his argument. To the contrary, Defendant's claim is in complete opposition to the record. As such, Defendant did not establish any merit to Defendant's underlying claim such that it would permit Habeas review. Thus, as Defendant failed to establish that the underlying claim has any merit, the Commonwealth submits that Defendant's claim fails and cannot be heard on Habeas review.

(IV.) Defendant claims that the Commowealth engaged in bad faith prosecution and withheld evidence from the Defendant, specifically, a video.

Defendant's final claim is that the Commonwealth engaged in bad faith prosecution and withheld video evidence from Defendant. This issue was addressed previously and the Commonwealth incorporates this argument here. The record reflects that two videos from the Community Progress Counsel were played for the jury, and the third camera was broken and did not produce any relevant recording. Thus, Defendant's claim fails and should be dismissed.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commonwealth of Pennsylvania, respectfully requests this Honorable Court deny Defendant's Petition for Habeas Corpus. The record shows that Defendant's claims are either waived, or Defendant failed to meet the requisite burden of proof required under 28 U.S.C. §2254(d) that the state level courts were unreasonable in the application of law.

Respectfully submitted,

Date: 12/21/15

/s/ Renée E. Franchi
Renée E. Franchi
Trial Deputy Prosecutor
Pa. Supreme Court ID: 313950
Office of the District Attorney
45 N. George Street
York, Pennsylvania 17401
Tel: (717) 771-9600

IN THE MIDDLE DISTRICT OF PENNSYLVANIA

JOSE ALBERT CASTRO,	:	CIVIL ACTION No. 4:15-CV-1833
	:	
Petitioner	:	
	:	(Judge Brann)
v.	:	
	:	
ROBERT GILMORE,	:	
	:	(Magistrate Judge Carlson)
Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that I am, on this day, serving the foregoing **Response to Petition for Habeas Corpus** upon the persons and in the manner indicated below:

United States First Class Mail, postage prepaid, addressed to the following:

Jose Albert Castro JV-6819
S.C.I. Greene
169 Progress Drive
Waynesburg, PA 15370

Respectfully submitted,

Date: 12/21/15

/s/ Renée E. Franchi
Renée E. Franchi
Trial Deputy Prosecutor
Pa. Supreme Court ID: 313950
Office of the District Attorney
45 N. George Street
York, Pennsylvania 17401
Tel: (717) 771-9600